



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: E.L. Hamm & Associates, Inc.

File: B-250932

Date: February 19, 1993

William F. Dalton for the protester.
Robert S. Brock, Esq., Federal Emergency Management Agency,
for the agency.
John Formica, Esq., and James A. Spangenberg, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Contracting agency failed to conduct meaningful discussions with the protester where the agency's discussion questions did not inform the protester of the central deficiency in its proposal--the perceived lack of experience of the site manager--thereby effectively precluding the protester from having a reasonable chance for award since it did not address the deficiency in its best and final offer.

DECISION

E.L. Hamm & Associates, Inc. protests the award of a contract to Scientific & Commercial Systems Corporation (SCSC) under request for proposals (RFP) No. EME-93-R-0360, issued by the Federal Emergency Management Agency (FEMA) for the preparation and delivery of training materials in support of training programs administered by the agency. Hamm contends that meaningful discussions were not conducted and proposals were not evaluated in accordance with the RFP.

We sustain the protest because meaningful discussions were not conducted with Hamm.¹

¹Since we sustain this protest and recommend reopening of discussions, our discussion of the evaluation of Hamm's proposal is necessarily general.

The RFP was issued on July 24, 1992, for professional and administrative support for course development, course delivery, and program support for the National Fire Academy.² The RFP contemplated the award of a cost-plus-fixed-fee contract for a base year with two 1-year options. The RFP requested the submission of technical and business proposals, and contained detailed instructions regarding the preparation of the proposals. The RFP advised that technical factors were more important than cost/price, and listed the following technical evaluation factors:

- (1) Organizational Experience and Past Performance
- (2) Qualifications of the Offeror's proposed Site Manager
- (3) Offeror's Quality Control Plan
- (4) Workplan

The first, second and fourth evaluation factors were said to be equal in importance, with each being three times as important as the third factor. The solicitation also provided that the qualifications of the offerors' proposed site managers would be evaluated with regard to the site managers' experience supervising projects of similar size, reputation for timely, accurate, and cooperative performance, and experience in the use of Apple Macintosh computers, various software packages, and desktop publishing programs.

The offers of Hamm and SCSC (the incumbent contractor) were the only two received by the agency in response to the RFP by the August 24 closing date. These proposals were evaluated by the technical evaluation panel (TEP). SCSC's proposal was rated as "acceptable" with "low" proposal risk,³ and Hamm's proposal was rated as "marginal" with "high" proposal risk.⁴ Both proposals were included in the

²The National Fire Academy provides specialized training for fire service and emergency management personnel in the areas of fire prevention, arson investigation, hazardous materials, training methodologies, management and executive development.

³While the TEP characterized SCSC's initial technical proposal as "exceptional," the contracting officer rated it "acceptable."

⁴Proposals were to receive an overall rating of "exceptional," which was defined as exceeding the standards in a beneficial way with a high probability of success and no significant deficiencies; "acceptable," which was defined
(continued...)

competitive range, discussions were held, and best and final offers (BAFO) requested and received. SCSC's BAFO received a rating of "exceptional" at a total price of \$1,441,537. Hamm's BAFO received a rating of "acceptable" at a total price of \$1,200,036. The agency determined that SCSC's offer was the most advantageous based on technical and cost/price considerations, and made award to that firm. This protest followed.

The gravamen of Hamm's protest is that the agency did not conduct meaningful discussions. In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. 41 U.S.C. § 253b(d) (1988); Federal Acquisition Regulation (FAR) § 15.610. FAR § 15.609(a) provides that the competitive range must include all proposals that have a reasonable chance of being selected for award. National Sys. Mgmt. Corp., 70 Comp. Gen. 443 (1991), 91-1 CPD ¶ 408. Although discussions need not be all-encompassing, discussions are required to be meaningful; that is, an agency is required to point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in technical transfusion or technical leveling. FAR § 15.610(c) and (d); Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527; URS Int'l, Inc. et al., B-232500; B-232500.2, Jan. 10, 1989, 89-1 CPD ¶ 21. In general,

⁴(...continued)

as meeting the standards with a good probability of success and minor deficiencies that can be easily corrected; "marginal," which was defined as failing to meet significant standards with a low probability of success and significant deficiencies that are susceptible of correction through discussions; and "unacceptable," which was defined as failing to meet significant standards with no reasonable likelihood of success and major or extensive deficiencies requiring a major proposal revision. Each specific evaluation factor and subfactor was evaluated as either failing to meet, meeting, or exceeding the standards established. Proposals were also to receive an overall proposal risk assessment, with "high" risk being defined as likely to cause serious disruption of schedule, increase in cost, or degradation of quality even with special efforts during contract administration; "moderate" risk being defined as having the potential to cause some disruption of schedule, increase in cost, or degradation of quality which special efforts during contract administration having the possibility to overcome these difficulties; and "low" risk being defined as having little potential to cause disruption of schedule, increase in cost, or degradation of quality, with normal contract administration efforts being able to overcome minor difficulties.

agencies must lead offerors into areas of their proposals which require amplification or correction, Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424, and discussions should be as specific as practicable considerations will permit. Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300.

Discussions cannot be meaningful if an offeror is not advised, in some way, of the weaknesses, excesses, or deficiencies in its proposal that must be addressed in order for the offeror to be in line for award. See Mikalix & Co., *supra*; Price Waterhouse, 85 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, *aff'd*, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333. Additionally, an agency may not mislead an offeror, through the framing of discussion questions, into responding in a manner that does not address the agency's concerns. Son's Quality Food Co., *supra*; Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136.

The record establishes that the agency found Hamm's initial offer and BAFO deficient primarily because of the perceived lack of experience of Hamm's proposed site manager in "supervising projects of similar size and complexity." In this regard, four of five TEP members found that Hamm's proposed site manager failed to meet the agency's minimum requirements in this area. This low regard for the experience of Hamm's proposed site manager resulted in Hamm's proposal receiving an overall rating of "fails" from the TEP under the relevant evaluation subfactor. This was the only rating of "fails," which Hamm's proposal received. Further, the TEP report to the contract specialist stated that Hamm's "proposed [s]ite [m]anager is completely lacking in experience in managing a project of this type. An experienced [s]ite [m]anager is absolutely crucial to the success of a project of this type. . . ." Additionally, the contracting officer, in recommending SCSC for award, echoed the findings of the TEP and noted that Hamm's lack of an experienced site manager "could result in poor performance, poor quality of work, disruption in schedules, increase in costs, etc."

The agency's discussions with Hamm consisted only of a request for Hamm to "clarify travel expenses and costs for materials." The agency failed to point out, or even hint at, the principal deficiency in Hamm's initial offer--the perceived lack of experience of Hamm's proposed site manager in supervising similar projects--even though this was the primary reason for Hamm's low rating.

As discussed above, agencies must conduct meaningful discussions with all offerors in the competitive range, whether their proposals are acceptable, outstanding, or only susceptible of being made acceptable. Although Hamm's proposal received an overall rating on its initial proposal of

"marginal" with "high" risk, the agency determined that it should be included in the competitive range, i.e., that with discussions, Hamm's proposal would have a reasonable chance for award, FAR §15.609(a). That being so, FEMA was required to conduct sufficient discussions to lead Hamm to the central area of FEMA's concern, so that Hamm would have the opportunity to improve its proposal (by, for example, providing further explanation or substituting a more experienced site manager) so that it would have a reasonable chance for award. Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 539; Son's Quality Food Co., supra; URS Int'l. Inc. et al., supra. FEMA did not do so, and for this reason we sustain the protest.

We recommend that FEMA reopen negotiations, conduct meaningful discussions with Hamm and SCSC and request best and final offers. If as a result of FEMA's evaluation of the revised proposals, Hamm is found entitled to award, SCSC's contract should be terminated for the convenience of the government and award made to Hamm, if Hamm is otherwise eligible. In addition, Hamm is entitled to its costs of filing and pursuing the protest. 44 C.F.R. § 21.6(d) (1) (1992).

Milton J. Aveter
for Comptroller General
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